

#### **405 KAR 7:030. Applicability.**

RELATES TO: KRS 350.010, 350.028, 350.057, 350.060, 350.151, 350.465, 30 C.F.R. Parts 700.11, 707.11-.12, 730-733, 735, 917, 30 U.S.C. 1253, 1255, 1278, 1291

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.465, 30 C.F.R. Parts 700.11, 707.11-.12, 730-733, 735, 917, 30 U.S.C. 1253, 1255, 1278, 1291

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 in pertinent part requires the cabinet to promulgate rules and administrative regulations pertaining to surface coal mining and reclamation operations. This administrative regulation designates 405 KAR Chapters 7 through 24 as applicable to all coal exploration and surface coal mining and reclamation operations, and specifies those activities to which 405 KAR Chapters 7 through 24 do not apply. This administrative regulation reflects the jurisdiction of the cabinet over coal exploration and surface coal mining and reclamation operations and sets forth certain nonjurisdictional activities.

Section 1. Applicability. 405 KAR Chapters 7 through 24 apply to all coal exploration and surface coal mining and reclamation operations, except any surface coal mining and reclamation operations which, together with any related operation, affected an area of two (2) acres or less, which were conducted pursuant to a two (2) acre or less permit issued by the cabinet, which were commenced on or before June 5, 1987, and on which mining ceased on or before November 7, 1987, in which case the provisions of 405 KAR Chapter 26 and KRS 350.060(13) shall apply.

(1) For purposes of this administrative regulation, if a segment of a road is used for access or coal haulage by more than one (1) surface coal mining operation, the entire segment shall be included in the affected area of each of those operations; except that two (2) or more operations which are deemed related pursuant to subsection (2) of this section shall be considered as one (1) operation for the purposes of this subsection.

(2) Except as provided in subsection (3) of this section, surface coal mining operations shall be deemed related if they occur within twelve (12) months of each other, are physically related, and are under common ownership or control.

(a) Operations shall be deemed physically related if drainage from both operations flows into the same watershed at or before a point within five (5) aerial miles of both operations.

(b) Operations shall be deemed under common ownership or control if they are owned or controlled, directly or indirectly, by or on behalf of:

1. The same person;
2. Two (2) or more persons, one (1) of whom controls, is under common control with, or is controlled by the other; or
3. Members of the same family and their relatives, unless it is established that there is no direct or indirect business relationship between or among them.

(c) For purposes of this subsection, control exists if one has ownership of fifty (50) percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one (1) person the ability in fact or in law to direct what the other does; or any relationship which gives one (1) person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

(3) Notwithstanding the provisions of subsection (2) of this section, the cabinet may determine, in accordance with the procedures applicable to requests for determination of exemption pursuant to Section 3 of this administrative regulation, that two (2) or more surface coal mining operations shall not be deemed related if, considering the history and circumstances relating to the coal, its location, the operations at the sites in question, all related operations and all persons mentioned in subsection (2)(b) of this section, the cabinet concludes in writing that the operations are not of the type which SMCRA was intended to regulate and that there is no intention on the part of the operations

or persons to evade the requirements of KRS Chapter 350 or 405 KAR Chapters 7 through 24.

(4) The exemption provided by this section applies only to operations with an affected area of less than two (2) acres where coal is being extracted for commercial purposes and to surface coal mining operations within that affected area incidental to those operations.

Section 2. Coal Extraction Incidental to Government Financed Construction. (1)(a) Coal extraction which is an incidental part of government-financed construction is exempt from KRS Chapter 350 and 405 KAR Chapters 7 through 24, except subsection (2) of this section shall apply.

(b) Any person who conducts or intends to conduct coal extraction which does not satisfy paragraph (a) of this subsection shall not proceed until a permit has been obtained from the cabinet.

(c) Reclamation of abandoned mined lands funded under Title IV of SMCRA shall be deemed government-financed construction.

(2) Information to be maintained on site. Any person extracting coal incident to government-financed highway or other construction who extracts more than 250 tons of coal or affects more than two (2) acres shall maintain, on the site of the extraction operation and available for inspection, documents which show:

(a) A description of the construction project;

(b) The exact location of the construction, right-of-way or the boundaries of the area which will be directly affected by the construction; and

(c) The government agency which is providing the financing and the kind and amount of public financing, including the percentage of the entire construction costs represented by the government financing.

Section 3. Exemptions. (1) Exemptions from 405 KAR Chapters 7 through 24 shall be recognized for the following:

(a) The extraction of coal by a landowner of fifty (50) tons or less within twelve (12) successive calendar months for his or her own noncommercial use from land owned or leased by him or her. Noncommercial use does not include the extraction of coal by one (1) unit of an integrated company or other business or nonprofit entity which uses the coal in its own manufacturing or power plants;

(b) The extraction of or intent to extract twenty-five (25) tons of coal or less by any person by within twelve (12) successive calendar months;

(c) The extraction of coal as an incidental part of federal, state or local government-financed highway or other construction; and

(d) The extraction of coal incidental to the extraction of other minerals if coal does not exceed sixteen and two-thirds ( $16 \frac{2}{3}$ ) percent of the tonnage of coal and other minerals removed for purposes of commercial use or sale in accordance with 405 KAR 7:035.

(2) The cabinet may on its own initiative and shall, within a reasonable time of a request from any person who intends to extract coal pursuant to subsection (1)(a) through (c) of this section, make a written determination whether the operation is exempt from 405 KAR Chapters 7 through 24. The cabinet shall give reasonable notice of the request to interested persons. Prior to the time a determination is made, any person may submit, and the cabinet shall consider, any written information relevant to the determination. A person requesting that an operation be declared exempt shall have the burden of establishing the exemption.

(3) If a written determination of exemption pursuant to subsection (1)(a) through (c) of this section is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination shall not be cited for violations which occurred prior to the date of the reversal. This subsection shall not apply to two (2) acre permits.

(4) Exemptions pursuant to subsection (1)(d) of this section shall be subject to 405 KAR 7:035.

Section 4. Termination and Reassertion of Jurisdiction. (1) Beginning November 1, 1992, the jurisdiction of the cabinet under 405 KAR Chapters 7-24 over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, or coal exploration operation, shall terminate when:

(a) The cabinet has determined in writing that all requirements imposed under 405 KAR Chapters 7-24 and KRS Chapter 350 have been successfully completed; or

(b) If a performance bond was required, the cabinet has made a final decision in accordance with 405 KAR 10:040 to release the performance bond fully. For the purposes of this section, the cabinet's decision to release the performance bond shall not be final until the time to file administrative and judicial appeals has expired and all appeals have been resolved.

(2) If jurisdiction was terminated under subsection (1) of this section, the cabinet shall reassert jurisdiction under 405 KAR Chapters 7-24 over the site if it is demonstrated that the bond release decision or written determination referred to in subsection (1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

(3) If the cabinet prior to November 1, 1992, terminated jurisdiction under 405 KAR Chapters 7-24 over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, or coal exploration operation, the cabinet shall reassert jurisdiction over the site if it is demonstrated that the bond release decision or other determination that led to the termination of jurisdiction was based upon fraud, collusion, or misrepresentation of a material fact. (8 Ky.R. 1465; eff. 2-2-83; Am. 10 Ky.R. 788; eff. 4-23-84; 11 Ky.R. 576; eff. 10-9-84; 15 Ky.R. 402; eff. 12-13-88; 18 Ky.R. 353; eff. 11-26-91; 19 Ky.R. 464; eff. 11-9-92.)